

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

TERI DEAN,)	
)	
Plaintiff,)	
)	
v.)	No. 5:19-CV-06022-SRB
)	
EDWARD BEARDEN, et al.)	
)	
Defendants.)	

DEFENDANT PRECYTHE’S MOTION TO DISMISS

Defendant Anne L. Precythe, through counsel, moves that she be dismissed as a defendant from this case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

THE CLAIMS

Plaintiff claims that four corrections officers sexually assaulted her while she was a prisoner at the Chillicothe Correctional Center and that Defendant Precythe, the Director of the Missouri Department of Corrections, knew or should have known that these corrections officers were engaging in that misconduct, but did nothing to prevent it. Specifically, Plaintiff claims that Defendant Precythe: (1) acted with deliberate indifference to her safety by failing to take measures to reduce the risk of sexual assault of inmates by officers, in violation of the Eighth Amendment to the United States Constitution (Count V); (2) negligently failed to protect her from sexual assault (Counts VI and XXIII); (3) is vicariously liable for the actions of the other defendants (Count XXIV); and (4) is responsible for the actions of the other defendants under a premises liability theory (Count XXV). Defendant Precythe denies Plaintiff’s allegations.

STANDARD OF REVIEW

In assessing a motion under Fed. R. Civ. P. 12(b)(6), a court should not dismiss the complaint unless the plaintiff has failed to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must presume that the factual allegations of the complaint are true and accord all reasonable inferences from those facts to the nonmoving party. *Cole v. Homier Distributing Co.*, 599 F.3d 856, 861 (8th Cir. 2010).

This Court should grant this motion to dismiss because, even if every factual allegation of the complaint is presumed true and plaintiff is accorded all reasonable inferences from those facts, the complaint does not state a plausibly valid claim.

ARGUMENT

Defendant Precythe Entitled to Official Immunity on State Claims. Official immunity protects public officers acting within the scope of their authority from liability for injuries arising from their discretionary acts or omissions, but not from liability for torts committed when acting in a ministerial capacity. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). The difference between discretionary and ministerial acts “depends on the degree of reason and judgment required.” *Id.* As the *Southers* Court explained:

A discretionary act requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued. [*Kanagawa v. State*, 685 S.W.2d 831, 836 (Mo. banc 1985).] A ministerial function, in contrast, is one “of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.” *Id.* (internal citations omitted).

263 S.W.3d at 610.

In Counts VI, XXIII, and XXV,¹ Plaintiff asserts Defendant Precythe negligently failed to prevent harm to her by not controlling her subordinate employees and not implementing policies or practices designed to prevent harm to her. Management of employees and the determination of appropriate policies and practices are not tasks of a clerical nature and not tasks that Defendant Precythe can undertake without regard to her own judgment or opinion. Rather, both tasks require the exercise of discretion. Because Plaintiff's state law claims against Defendant Precythe involve her performance of discretionary functions, she is entitled to official immunity and to the dismissal of Counts VI, XXIII, and XXV.

Defendant Precythe Protected by the Public Duty Doctrine on State Claims. The public duty doctrine provides that public employees are not liable for injuries resulting from the breach of duty owed to the general public as distinguished from a duty owed to particular individuals. *Southers*, 263 S.W.3d at 611. As discussed above, the challenged conduct of Defendant Precythe involves her management of employees and determination of appropriate policies and practices. These management duties run not to the individual prisoners confined by the Department of Corrections, but to Defendant Precythe's employer, the State of Missouri, and hence, to the public at large. *See Jamierson v. Dale*, 670 S.W.2d 195, 196 (Mo. App. W.D. 1984) (duty of employee of Division of Family Services to inspect and to enforce safety regulations pertaining to day care centers, ran to her employer, the State of Missouri, and, hence, to the public at large). Because the duties alleged to have been breached in Counts VI, XXIII, and XXV are ones owed to the general public, the Defendant Precythe is protected from suit on these state claims by the public duty doctrine. Thus, these claims fail to state a claim upon which relief can be

¹ Premises liability, as alleged in Count XXV, is a particular type of negligence theory. *See Wieland v. Owner-Operator Services, Inc.*, 540 S.W.3d 845, 848-49 (Mo. banc 2018); *Key v. Diamond Int'l Trucks*, 453 S.W.3d 352, 360 (Mo. App. W.D. 2015).

granted.

Defendant Precythe Not Subject to Liability Based on *Respondeat Superior*. Count XXIV asserts that Defendant Precythe is vicariously liable for the alleged conduct of the other defendants based on a *respondeat superior* theory. But public officers are not subject to liability for the acts or omissions of subordinate public employees under a *respondeat superior* theory. *Jackson v. Wilson*, 581 S.W.2d 39, 46 (Mo. App. W.D 1979) (regarding state tort claims); *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (regarding § 1983 claims). Count XXIV should be dismissed on this basis.

Defendant Precythe Not Subject to Suit in Her Official Capacity on Claims Brought under 42 U.S.C. § 1983. Count V asserts a claim against Defendant Precythe under 42 U.S.C. § 1983. She is sued in both her official and individual capacities. 1st Amended Complaint at ¶ 13. But state employees sued in their official capacities are not “persons” subject to suit under § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). Thus, the official capacity claims against Defendant Precythe in Count V should be dismissed.²

Claims for Injunctive Relief Fail. Among other remedies, Plaintiff asks for injunctive relief directing Defendant Precythe to remove Defendants Mustain and Mosier from the Chillicothe Correctional Center and to ban them from ever working at any prison operated by the Missouri Department of Corrections. 1st Amended Complaint at p. 29 (Relief Section). It is well established that injunctive relief will not issue unless there is a “real or immediate threat that the plaintiff will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Brazil v. Ark. Dep’t of Human Serv.*, 892 F.3d 957 (8th Cir. 2018).

² The Eleventh Amendment also bars damages claims against public servants in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

Plaintiff is no longer confined at Chillicothe. 1st Amended Complaint at ¶ 26. There is also no allegation from which it can be inferred that there is any prospect of Defendants Mustain or Mosier being assigned to another prison at which Plaintiff is confined. Thus, there is no real or immediate threat that Plaintiff here will be wronged again by Defendants Mustain or Mosier. Therefore, Plaintiff's request for injunctive relief should be dismissed.

§ 1983 Claim Fails Because Plaintiff Does Not Allege Actual Knowledge of Substantial Risk to Plaintiff. In Count V, Plaintiff asserts that Defendant Precythe violated the Eighth Amendment by failing to protect her from alleged assaults by four corrections officers. 1st Amended Complaint at ¶¶ 123, 134. In order to establish a failure to protect claim, a prisoner must show that a prison official was deliberately indifferent to the prisoner's safety. *Patterson v. Kelley*, 902 F.3d 845, 851 (8th Cir. 2018). A prison official does not act with deliberate indifference unless "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A prison official's failure to alleviate a substantial risk of harm to a prisoner's physical well-being which he or she should have known of, but did not have actual knowledge of, does not establish deliberate indifference. *Id.* at 838.

Plaintiff here alleges only that "[u]pon information and belief, Precythe knew or should have known" that the corrections officer defendants were assaulting her and also that "[i]t was Precythe's duty to discover and prevent sexual assaults of offenders at all Missouri penal institutions." 1st Amended Complaint at ¶¶ 91, 94-96. These allegations, however, are not sufficient to state a plausibly valid claim of deliberate indifference to Plaintiff's safety.

In *Ho v. Jett*, 2014 WL 991113, *1 (D. Minn. 2014), *magistrate's report and*

recommendation adopted in relevant part, 2014 WL 991128 (D. Minn. 2014), a prisoner sued federal officials (in a *Bivens* claim) for failing to protect him from an assault by another inmate. The prisoner alleged that: “Upon information and belief, Plaintiff understands that Defendants Warden [Jett], Lewis, Gora, and Federal Employees knew that Defendant Dugan was making sexually charged comments about having sex with Plaintiff, or about sexually assaulting him” 2014 WL 991113, at *6. The magistrate ruled that the prisoner’s allegations were “vague and conclusory at best, stating only that it is Plaintiff’s *understanding* that the Federal Defendants knew that Dugan was making sexually explicit comments to and regarding Plaintiff.” *Id.* at 7. (Emphasis in original.) But, the magistrate continued, the complaint contained “no specific facts indicating that this was indeed the case, or that any of the Federal Defendants *actually possessed subjective knowledge* of the risk Dugan posed to Plaintiff and deliberately ignored it.” *Id.* (Emphasis in original.) The magistrate concluded that “[a]s a result, the Amended Complaint is insufficient to sustain Plaintiff’s Eighth Amendment *Bivens* claim for deliberate indifference to the need to protect Plaintiff from a substantial risk of harm. *Id.*

Plaintiff’s claims here are similarly “vague and conclusory at best.” No facts are alleged indicating that Defendant Precythe had actual knowledge of any risk to plaintiff. In fact, the assertions that Defendant Precythe “knew or should have known” that the corrections officer defendants were assaulting her and that it was her “duty to discover and prevent sexual assaults” amount to claims of negligence at best. The Eighth Circuit “has repeatedly held mere negligence or inadvertence does not rise to the level of deliberate indifference.” *Kulkay v. Roy*, 847 F.3d 637, 643 (8th Cir. 2017). Because Plaintiff’s allegations are insufficient to sustain a claim of deliberate indifference, Count V should be dismissed for failure to state a claim.

Defendant Precythe Entitled to Qualified Immunity on § 1983 Claim.

Defendant Precythe is also entitled to immunity from the civil rights claim in Counts V under the doctrine of qualified immunity. Qualified, or good faith, immunity provides governmental officials with immunity from suit “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is immunity from suit rather than a mere defense of liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). “Whether the right at issue was ‘clearly established’ is a question of law for the court to decide.” *Wright v. United States*, 813 F.3d 689, 695-96 (8th Cir. 2015).

The standard for qualified immunity cannot be applied in a general sense. A plaintiff cannot avoid the rule of qualified immunity “simply by alleging the violation of extremely abstract rights.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). As the Supreme Court explained in *Anderson*:

It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law, the unlawfulness must be apparent.

Id. 640. The Court emphasized that this subjective legal reason test requires a “fact-specific inquiry.” *Id.* at 641.

Additionally, qualified immunity “ ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’ ” *Cross v. City of Des Moines*, 965 F.2d 629, 631 (8th. Cir. 1992) (citing *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

In this case, Defendant Precythe violated no law, clearly established or otherwise. In Count

V, Plaintiff contends that Defendant Precythe facilitated the other defendants' alleged misconduct by failing to take appropriate steps to prevent that misconduct despite knowing or having reason to know (based upon Plaintiff's information and belief) of widespread allegations of sexual abuse in Missouri prisons and of allegations of misconduct committed by the corrections officer defendants. Plaintiff's specific allegation is that Defendant Precythe knew or should have known about the alleged misconduct at Chillicothe Correctional Center (CCC) by at least June 2018, following the filing of a lawsuit against Defendant Bearden on May 29, 2018; two more lawsuits filed shortly thereafter; and a local and national news story appearing by June 2, 2018. 1st Amended Complaint at ¶¶ 88-90. Plaintiff also alleges that the last assaults by Defendant Bearden occurred in July 2018. 1st Amended Complaint at ¶¶ 28, 41.

Thus, based on Plaintiff's allegations, she was subjected to misconduct by Defendant Bearden for no more than one to two months after Defendant Precythe allegedly had reason to believe that Defendant Bearden was acting improperly. Even if Defendant Precythe actually became aware of the lawsuit against Bearden, the two other suits, or the news story, it would still be reasonable for the Department of Corrections to have the allegations investigated and assess the facts revealed in such an investigation before considering taking any action against Defendant Bearden. Allegations of wrongdoing alone are not sufficient to justify an employer in taking action against an employee. It would also be reasonable for Department to have additional time after such an investigation of Defendant Bearden to consider formulation and implementation of systemic changes to prison policy and practice.

Case law shows that taking time for an investigation and assessment of evidence is appropriate. In *Johnson v. Johnson*, 385 F.3d 503, 513-14 (5th Cir. 2004), a prisoner sued the Director of the Texas Department of Criminal Justice, the Director of Classification, and a senior

warden (and others), for failure to protect him from repeated sexual assaults by other prisoners. The Court ruled that the Department Director, Classification Director, and senior warden were entitled to qualified immunity because they responded to the plaintiff's complaints by referring the matter for investigation. *Id.* at 526. The Court held that this action "was a reasonable discharge of their duty to protect the inmates in their care." *Id.*

In *Frederick v. Simpson College*, 149 F. Supp. 2d 826, 832 (S.D. Iowa), a college's investigation into a student's claim of harassment by a professor took 37 days from the day the student provided notice of the claim to an assistant dean. The Court found that the college did not act with deliberate indifference with respect to the student's Title IX claim where it deferred any action until it conducted its investigation. *Id.* at 840.

Because there is no clearly established law that required Defendant Precythe to take any action against Defendant Bearden or to change policies within one to two months of the allegations of wrongdoing against Defendant Bearden, even if she had known of such allegations, she is entitled to qualified immunity from Plaintiff's federal claims relating to Defendant Bearden.

The claims against Defendant Precythe based on the alleged wrongdoing of the other three corrections officer defendants have even less merit. Plaintiff makes no allegation that Defendant Precythe was aware of any specific facts that would have provided a reasonable basis for her to suspect the other corrections officers of misconduct. Plaintiff merely alleges that "[u]pon information and belief, Precythe knew or should have known" that Defendants Mosier, Mustain, and Reed were assaulting her. 1st Amended Complaint at ¶¶ 94-96. Even if she did have reason for suspicion and to order an investigation, the last alleged incident of physical abuse occurred in August 2018. 1st Amended Complaint at ¶¶ 50, 64. (Plaintiff did allege that verbal abuse continued through October 2018. 1st Amended Complaint at ¶ 56.) But, as discussed above, it is

not unreasonable for an employer to take time to investigate claims and assess facts revealed by the investigation before acting. The alleged assaults by the other three corrections officers ended no more than three months from the time of the initial lawsuit against Defendant Bearden, the other two lawsuits, and the news story that allegedly gave Defendant Precythe notice the alleged misconduct occurring at Plaintiff's prison. Considering that Plaintiff has alleged no information that would cause suspicion that any of the other three corrections officers were engaged in misconduct, it would be reasonable for an investigation to take at least three months.

As shown by the cases discussed above, there is no clearly established law that required Defendant Precythe to take any action against the other three corrections officer defendants or to change any policies in the circumstances and time period as alleged and she is thereby also entitled to qualified immunity from Plaintiff's federal claims relating to Defendants Mosier, Mustain, and Reed.

WHEREFORE, Defendant Precythe prays this Court to dismiss the claims against her in this case for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2019, I filed the foregoing electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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